IN THE

Supreme Court of the United States

October Term, 1943

No. 265

NATIONAL LABOR RELATIONS BOARD

v.

MEDO PHOTO SUPPLY CORPORATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER N. SELIGSBERG,
Attorney for Petitioner.

WILLIAM E. FRIEDMAN,
of Counsel.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	12
Appendix	13

Citations.

Cases:

New England Transportation Co., 1 N. L. R. B. 130 . . 11

Swayne & Hoyt, Ltd., 2 N. L. R. B. 284 11

Statutes:

Judicial Code:

Sec. 240(a) 2

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 499, 29 U. S. C. A., Sec. 151 *et seq.*):

Sec. 1 . . . . . 11, 13

Sec. 2(4) 10, 11, 13

Sec. 8(1) 2, 7, 13

Sec. 8(5) 2, 7, 13

Sec. 10(e) 2

Sec. 10(f) 2

IN THE

Supreme Court of the United States

October Term, 1943

No. .....

NATIONAL LABOR RELATIONS BOARD

v.

MEDO PHOTO SUPPLY CORPORATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Medo Photo Supply Corporation, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered on May 21, 1943 (R. 311, 312) enforcing an order of the National Labor Relations Board (herein called the Board) issued against your petitioner (R. 293-295).

Opinions Below

The opinion and concurring opinion of the court below (R. 304-310) are reported in 135 F. (2d) 279. The decision, findings of fact, conclusions of law and order of the Board (R. 275-295) are reported in 43 N. L. R. B. 989.

Jurisdiction

The decree of the court below (R. 311-312) was entered on May 21, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act (herein called the Act).

Questions Presented

1. Has an employer been guilty of an unfair labor practice under Sec. 8 (1) of the Act viz: been guilty of interfering, restraining or coercing employees in the exercise of their rights, where, after preliminary negotiations with a Union had been opened, the employees of their own accord and without suggestion from the employer stated that they were dissatisfied with the Union and requested the employer to deal with them directly, and the employer did so, bargained directly with the employees and made a labor agreement with them?

2. Has an employer been guilty of an unfair labor practice under Sec. 8 (5) of the Act viz: refused to bargain collectively with the representatives of his employees, where, after preliminary negotiations with the Union had been opened, the employees of their own accord and with-

out suggestion from the employer stated that they were dissatisfied with the Union and requested the employer to deal with them directly, and the employer did so, bargained directly with the employees and made a labor agreement with them?

3. Is an employer guilty of unfair labor practices where, after a group of his employees had designated a Union as their exclusive bargaining agent and bargaining was about to start, the employees of their own accord and without suggestion or interference from their employer repudiated the Union and requested the employer to bargain with them directly, and the employer did so, and entered into a labor agreement with the employees directly and not through the medium of the previously designated and repudiated Union?

Statute Involved

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A. Sec. 151 *et seq.*) are set forth in the Appendix, *infra*, p. 13.

Statement

The petitioner is in the wholesale and retail photographic supply business, employing approximately 70 employees (R. 181, 197, 226, 243-244). Between May 21, and 23, 1941, eighteen of the twenty-six employees in the petitioner's shipping and receiving department signed membership application cards designating the American Federation of Photo Employees Union, Local 21314, affiliated

with the American Federation of Labor (herein called the Union) as their collective bargaining representative (R. 11, 14, 228-229). On May 22, 1941, the Union wrote petitioner requesting a meeting to negotiate a contract (R. 16, 230), and on the same day filed a petition with the Board for certification as the exclusive bargaining representative of the employees in the petitioner's shipping and receiving department as an appropriate unit (R. 53).

On June 4, 1941, a conference with respect to the Union's petition was held at the Board's Regional Office with representatives of the Union, the petitioner and the Board (R. 20). The petitioner questioned the appropriateness of the unit, maintaining that all its employees constituted a proper unit for collective bargaining and requested a hearing to determine the appropriateness of the unit claimed by the Union (R. 38). Notwithstanding the fact that the Union had petitioned for certification, it was reluctant to proceed with such a hearing, and at its suggestion a meeting was thereupon arranged between the Union and the petitioner for the following day to discuss the matter further (R. 21-22).

At the second conference on June 5th, three questions were discussed; the appropriateness of the unit, the Union's claim of majority representation and the Union's demands (R. 46, 160). A copy of the proposed contract was submitted by the Union, and it was agreed that if the Union could prove its majority representation, and if the unit claimed by the Union was proper, the petitioner would enter into a contract for collective bargaining (R. 65). The procedure was informal, as Stoltman, the Union's president, and petitioner's counsel had had previous dealings and arms length procedure was waived by tacit consent

(R. 160). A further conference was arranged for June 9th, to dispose of these questions (R. 26).

On Saturday, June 7th, Bruchbacher, one of the petitioner's employees who had signed an application card of the Union, discussed with his fellow employees the advisability of dropping the Union and of themselves approaching the petitioner for wage increases (R. 113). Bruchbacher testified that he did so of his own volition and at his mother's request, after a family discussion at home about the Union, in which his mother said: "There seems to be contentment there now, and it (the Union) would start a lot of trouble" (R. 114). All the eighteen employees who had signed the Union application cards, were lukewarm about the Union, and each said that he had signed the application card because he thought "most of the other fellows want it" (R. 113). When the employees found out that none of them really desired the Union for himself, they requested Bruchbacher to see Hoppin, petitioner's manager, and arrange a meeting (R. 113-114). These discussions were held without the knowledge of the petitioner (R. 114, 176, 180).

After working hours on the same day, twelve of the said eighteen employees went to Hoppin and informed him that they, of their own volition, had decided that they no longer wished the Union to represent them, and that they were interested only in securing wage increases, as the working conditions were excellent and they were happy with their jobs (R. 79, 85, 95, 115). Hoppin was not informed of the reasons for their decision, because he would not discuss the Union with them (R. 130, 177). What the employees had in mind is shown by their testimony. Goshgorian, one of the said eighteen employees, testified that

when he together with his fellow employees went to see Hoppin, he did not want the Union (R. 78, 80). Bruchbacher also testified that he told Hoppin at the meeting "that the fellows did not want the Union; that all they wanted was the raises, and that we had come up to ask for the raises" (R. 130). Seminara, another of the employees, testified that he heard stories about the Union, that he "didn't like so much", and that he "had a pretty definite idea what I was going to do before I went up there. It was not only the raise which decided it" (R. 108, 138).

On June 9th, the petitioner granted the request of its employees (R. 180), and while the wage increases did not in all respects meet the raises requested, the employees were satisfied (R. 179).

On the same afternoon the conference, which had been adjourned on June 5th, was held as scheduled in the offices of the petitioner's attorneys (R. 161). En route to the conference, the four employees, comprising the negotiating committee, informed the Union's president that they and their fellow employees no longer wished the Union to represent them (R. 124, 125). The president tried to induce the employees to remain in the Union, but they refused (R. 117). At the conference, the employees repeated their revocation of the Union's authority to represent them, and stated that they and all the other employees in the shipping and receiving department had come to this decision of their own volition and without any interference, suggestion or instigation by the petitioner (R. 62, 89, 94, 118, 142). The Union's representatives thereupon threatened the petitioner with strikes and boycotts and left the meeting (R. 95, 118).

The Union never called a meeting of the petitioner's employees thereafter, and when the Union's president attempted to communicate with the employees individually they refused to talk to him (R. 59). Thereupon, the Union filed the charge of unfair labor practice on about June 17, 1941 (R. 218-219). The Board did not issue a complaint on this charge until April 14, 1942 (R. 220-223).

During this intervening period a number of the employees left the petitioner's employ of their own accord to join the army, so that presently out of the said eighteen employees only one is still in the petitioner's employ (R. VII, 193, 194). Aside from this one employee, who rejected the Union in June, 1941, the Union has had no contact whatsoever with any of the petitioner's present employees (R. 59).

Reasons for Granting the Writ

1. The decree of the court below (R. 311-312), enforcing the order of the Board (R. 293-295), which holds that the petitioner by acceding to its employees' voluntary request for a wage increase, has violated Sections 8 (1) and 8 (5) of the Act, and directs the petitioner to bargain collectively with the Union as the exclusive representative of all the production employees, despite their abandonment of the Union, involves important questions of Federal law which have not been, but should be, settled by this Court. There do not appear to be any decided cases in point. No cases are cited by the court below on this principal issue (R. 304-310), and the numerous cases relied upon by the Board in its brief to the court below, without exception, involve situations of proved employer initiation and con-

trol. In the instant case the proposal for a wage increase and the rejection of the Union emanated from the employees alone, without any suggestion from the petitioner (R. 289, 290).

2. While the Board and both the majority and minority of the court below have reached the same conclusion, there is such a disparity in their views that the problem cannot properly be considered to have been settled. A resolving of these conflicting opinions is necessary to establish certainty in the administration of the Act, and to prevent confusion in employer-employee relations. This statute is one of our vital laws affecting the relationship and conduct of the great majority of employers and employees in the country, and it is important for them to know with some degree of definiteness to what extent they are permitted to deal with one another without the intervention of a union.

a. The Board based its determination upon its finding that the employees conditioned their abandonment of the Union upon the granting of wage increases (R. 288). The Board cannot contend that the petitioner suggested, influenced or coerced its employees in their decision to negotiate directly for wage increases. The record and decision of the Board shows beyond doubt that the employees acted of their own accord and volition (R. 285). At the close of the hearing before the Trial Examiner, the Board's attorney, in his summation, negated any suggestion of employer-control in the following words:

> "I don't say that this company is a malicious company. I think this is a close question • • • I do not think that the violation is malicious and of

the vicious type, which we have seen in some cases, but I feel there has been a violation" (R. 209).

b. Nevertheless, the gist of Judge Frank's opinion is that while in this case it has not been proved that the petitioner initiated the offer, proof of such activity is so difficult to adduce, that it may be assumed and form the basis for a determination of guilt (R. 307). There is no legal rule that warrants an assumption of a fact on which to predicate a decision, when the contrary has been proved and found. It is respectfully submitted that Judge Frank went too far in reading into the record of this case a finding of any employer-control, in the face of the undisputed evidence to the contrary, and then predicating his decision upon such finding.

Judge Frank does not hold that employees, who have selected a bargaining representative and especially when there has been no certification by the Board or an election, may not then, by an informal action, repudiate that representative and bargain directly with the employer (R. 306). Nor does he hold that it is invariably an unfair labor practice for a employer to accept an offer made by the employees to repudiate a representative theretofore selected on condition that the employer will increase wages (R. 306). In this respect Judge Frank differs from the Board which predicated its decision upon the fact that the employees' offer to repudiate the Union was conditioned upon a wage increase (R. 288). Yet, Judge Frank found the petitioner guilty of an unfair labor practice. The conclusion is irresistible that Judge Frank based his decision upon his finding of employer-control, which is contrary to the evidence and finding of the Board. The petitioner re-

spectfully submits that this is no judicial basis for a decision.

c. Judge Learned Hand refused to follow the majority of the court below on this point, because the Board did not rest its order on the finding of employer-control. Judge Hand disagrees with both the majority opinion and the Board and holds the unfair practice to be the inferential agreement by the employees that upon acceptance of their offer they would abandon collective bargaining, even though for an unspecified time (R. 310). His assumption that the employees' rejection of the Union was an abandonment of their right to collective bargaining is based upon the misconception that only institutionalized forms of collective bargaining are contemplated by the Act. This is not so, as the Act unambiguously defines representatives as "the term 'representatives' includes any individual or labor organization" (*N. L. R. A.*, §2 [4]). The employees in this small unit—26 in all—having effectively negotiated once with the petitioner, there was no promise not to do so again in the future, nor was there any evidence that the petitioner would have refused resumption of negotiations of this character.

Moreover, even if the right to collective bargaining could be said to have been surrendered in the sense that, to use the language of Judge Hand, "it would have been a breach of faith with the employer for the majority to turn about the next day and organize, even an unaffiliated union," what consequences could such a breach of faith possibly have that would be deserving of, or receive, the recognition of the Board? In this, it is the petitioner's respectful opinion that Judge Hand was unrealistic.

These conflicting theories, which if not clarified, will only lead to confusion in the administration of the Act, warrant the granting of this petition.

3. A further compelling reason for granting the petition is that the decision is contrary to the general purposes and public policy of the Act. The declared public policy of the Act is to diminish the causes of labor disputes by encouraging collective bargaining by employees through representatives of their own choosing, whether such representatives be the employees themselves or a labor organization (*N. L. R. A.*, §§1, 2 [4]). This policy is defeated when the employees and employer are compelled to negotiate through a union voluntarily abandoned by the employees. The Act does not compel employees to join a union, nor having once designated a union as their collective bargaining agent, are they foreclosed from thereafter changing their minds and deciding to bargain for themselves. The employees constituting a majority of the bargaining unit, had an unquestioned right to change their representation. No representative has any personal, vested right in his function as such; his right is purely derivative, subject to cancellation by the majority, who may furthermore resume their power as principal to negotiate directly with the employer. In fact, the Board has consistently recognized the right of employees to change their representatives, even in cases where an existing contract with the representatives has not yet expired. (*New England Transportation Co.*, 1 N. L. R. B. 130; *Swayne & Hoyt, Ltd.*, 2 N. L. R. B. 284.)

Where there has been no coercion or interference by the employer with the employees' right of collective bar-

gaining, there can be no finding of an unfair labor practice. Certainly, the Act is not designed to interfere with the employees' initiation of proposals for adjustment of industrial relations.

Since the employees rejected the union in June, 1941, their relationship with the petitioner has been harmonious. The injection of the Union now will only lead to confusion and unrest among the employees, a result which the Act was designed to eliminate.

CONCLUSION

The questions herein presented are of novel impression and of substantial public importance in the administration of the Act. It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER N. SELIGSBERG,
Attorney for Medo Photo Supply Company,
Petitioner.

WILLIAM E. FRIEDMAN,
of Counsel.

August, 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 499, 29 U. S. C. A. Sec. 151 *et seq.*) are as follows:

"Sec. 1. • • •

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

"Sec. 2. When used in this Act—

(4) The term 'representatives' includes any individual or labor organization."

"Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."